

## CHAPTER 64

### ARMY INDUSTRIAL ACTIVITIES

#### SALE OF MANUFACTURED ARTICLES OR SERVICES

##### OUTSIDE OF THE DEPARTMENT OF DEFENSE

A. AUTHORIZATION. Section 158 of the Fiscal Year 1994 DoD Authorization Act amended Chapter 433 of title 10, United States Code to authorize particular sales of certain working-capital funded industrial activities of the Army. Its provisions allowed for:

1. Authority Sell Outside DoD. A working-capital funded Army industrial facility (including a Department of the Army arsenal) that manufactures large caliber cannons, gun mounts, recoil mechanisms, ammunition, munitions, or components thereof may sell manufactured nondefense-related commercial articles or services to a person outside the Department of Defense if --

(a) in the case of an article, the article is sold to a United States manufacturer, assembler, developer, or other concern --

(1) for use in developing new products;

(2) for incorporation into items to be sold to, or to be used in a contract with, an agency of the United States;

(3) for incorporation into items to be sold to, or to be used in a contract with, or to be used for purposes of soliciting a contract with, a friendly foreign government; or

(4) for use in commercial products;

(b) in the case of an article, the purchaser is determined by the Department of Defense to be qualified to carry out the proposed work involving the article to be purchased;

(c) the sale is to be made on a basis that does not interfere with performance of work by the facility for the Department of Defense or for a contractor of the Department of Defense; and

(d) in the case of services, the services are related to an article authorized to be sold under 10 USC 4543 and are to be performed in the United States for the purchaser.

B. ADDITIONAL REQUIREMENTS. The following additional requirements also apply to sales under 10 USC 4543.

1. The authority to sell articles or services shall be exercised at the level of the commander of the major subordinate command of the Army with responsibility over the facility concerned.

2. A purchaser of articles or services shall use advance incremental funding to pay for the articles and services.

3. In the case of a sale of commercial articles or commercial services in accordance with paragraph A. above, by a facility that manufactures large caliber cannons, gun mounts, or recoil mechanisms, or components thereof, that facility shall --

(a) Charge the buyer the fixed and variable costs (that is, the full cost that is charged to buyers within the DoD that are associated with the commercial articles or commercial services sold.

(b) Enter into

(1) a firm, fixed-price contract for which the firm, fixed-price is, in good faith, established to recover the full cost that would be charged to a buyer within the DoD, or

(2) a cost reimbursement contract for the sale.

C. DEFINITIONS. In this chapter, and as related to 10 USC 4543, the following definitions apply.

1. Commercial Article. An article that is usable for a nondefense purpose.

2. Commercial Service. A service that is usable for a nondefense purpose.

3. Advance Incremental Funding. With respect to a sale of articles or services, means a series of partial payments for the articles or services that includes:

(a) one or more partial payments before the commencement of work or the incurring of costs in connection with the production of the articles or the performance of the services, as the case may be, and:

(b) subsequent progress payments that result in full payment being completed as the required work is being completed.

4. Variable Costs. With respect to sales of articles or services under 10 USC 4543, means the costs that are expected to fluctuate directly with the volume of sales and --

(a) in the case of articles, the volume of production necessary to satisfy the sales orders; or

(b) in the case of services, the extent of the services sold.

D. RELATIONSHIP TO ARMS EXPORT CONTROL ACT. Nothing in 10 USC 4543 shall be construed to affect the application of the export controls provided in section 38 of the Arms Export Control Act (22 USC 2778) to items which incorporate or are produced through the use of an article sold under this section.